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CHARLES ELMER CROPLEY
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In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 373

LIADOGA CANNING COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

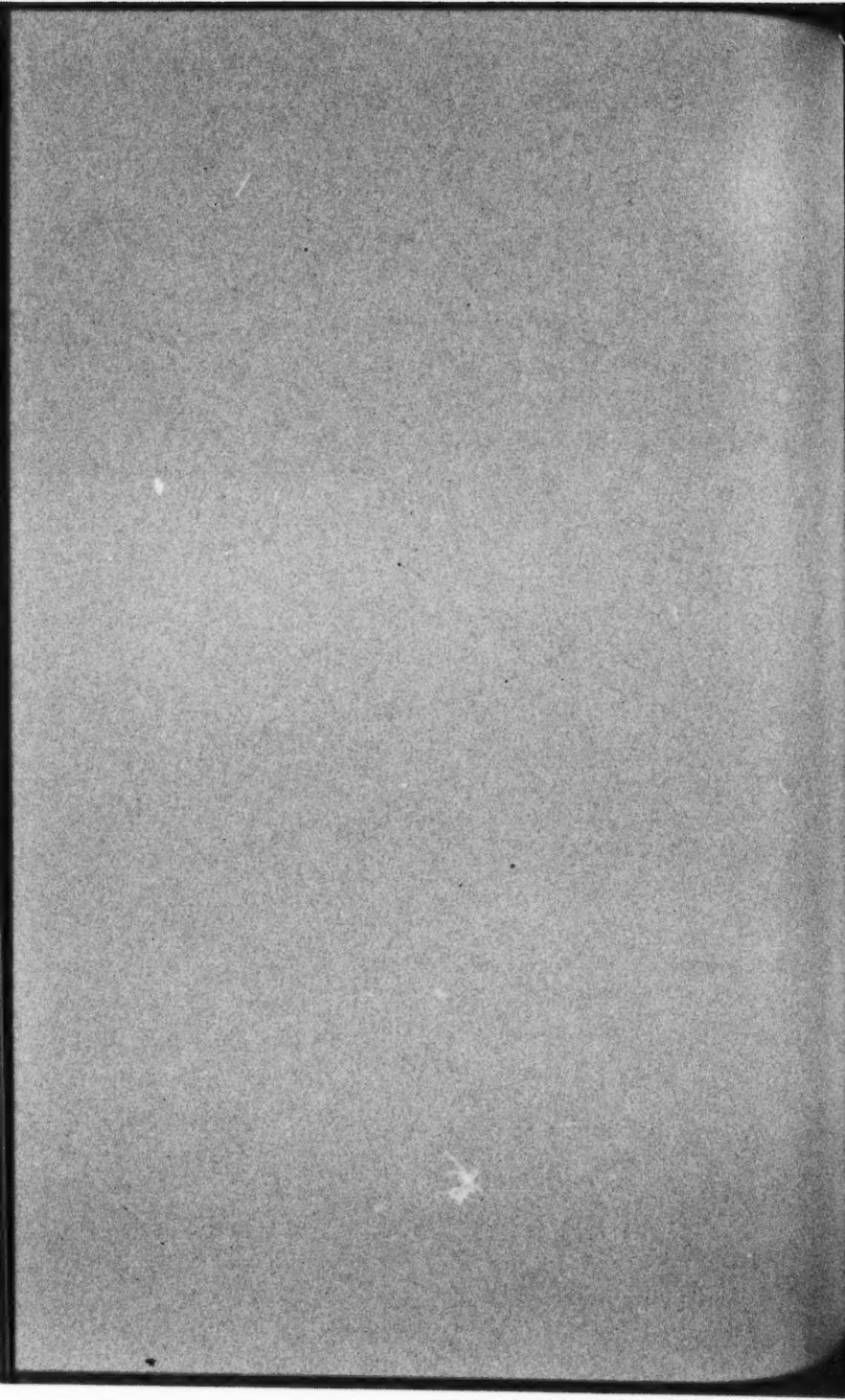
PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

HAROLD K. BACHMANN,
Consolidated Building,
Indianapolis, Indiana,

WILLIAM G. BACHMANN,
Consolidated Building,
Indianapolis, Indiana,

EDWIN H. CHANNY,
Union Commerce Building,
Cleveland, Ohio,
Attorneys for Petitioner.

SQUIRE, SANDERS & DEMPSEY,
BACHMANN & BACHMANN,
Of Counsel.



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In the Supreme Court of the United States

OCTOBER TERM, 1943.

No.

LADOGA CANNING COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner, Ladoga Canning Company, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above case on June 22, 1943 reversing the judgment of the United States District Court for the Northern District of Ohio, Eastern Division.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 4-6) is not reported. The opinion of the Circuit Court of Appeals (R. 14-20) is not yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 22, 1943. (R. 13.) Jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended. (28 U. S. C. 347(a).)

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

The constitutional provision and the statutes are quoted in the appendix.

QUESTION PRESENTED.

Is a seizure of goods pursuant to the Federal Food, Drug and Cosmetic Act in violation of the Fourth Amendment to the United States Constitution when the warrant of seizure and monition issued and the seizure was made without a showing of probable cause supported by oath or affirmation?

STATEMENT.

Alleging that they were adulterated within the Federal Food, Drug and Cosmetic Act because they contained decomposed material, the United States instituted a proceeding on April 9, 1942 in the United States District Court for the Northern District of Ohio, Eastern Division, against 935 cases of tomato puree which are owned by petitioner. (R. 2-3.) The prayer of the complaint sought a writ of attachment and monition, seizure of the goods, and their condemnation for destruction or sale. (R. 3.) Upon filing of the complaint and without any affidavit or showing by respondent, a deputy clerk of the District Court issued a warrant of seizure and monition to the United States Marshal who thereupon seized petitioner's goods.

Petitioner filed a special appearance and moved to quash the warrant and the seizure and for return of the goods on the ground that the warrant of seizure and the seizure were in violation of the Fourth Amendment to the United States Constitution because the warrant was issued without a showing of probable cause supported by oath or affirmation. (R. 3-4.) The District Court sustained the motion, dismissed the complaint, and ordered return of the goods. (R. 7.) Respondent promptly filed its notice of ap-

peal (R. 6) and approximately a week later the District Court stayed its order in respect of return of the goods. (R. 7.) Subsequently it denied petitioner's motion to modify this stay. (R. 8.)

Petitioner then filed a motion in the Circuit Court of Appeals for dissolution of the stay order. At the hearing of this motion petitioner and respondent argued the merits of both the motion and the appeal and jointly requested a decision on the merits as well as on the motion. On June 22, 1943, the Circuit Court of Appeals entered its judgment reversing the judgment of the District Court, overruling petitioner's motion for modification of the stay order, and remanding the cause to the District Court for further proceedings. (R. 13.)

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the warrant of seizure and the seizure of the goods were not in violation of the Fourth Amendment to the United States Constitution notwithstanding the warrant issued and the goods were seized without a showing of probable cause supported by oath or affirmation.

2. In overruling petitioner's motion for dissolution of the order of the District Court staying execution of its earlier order for return of the goods to petitioner.

3. In reversing the judgment of the District Court, and in remanding the cause to the District Court for further proceedings.

REASONS WHY THE WRIT SHOULD BE GRANTED.

The decision of the Circuit Court of Appeals is in probable conflict with the decision of this Court in *Boyd v. United States*, 116 U. S. 616, and with principles announced in *Carroll v. United States*, 267 U. S. 132. It presents a

substantial federal question of great importance which has not been specifically answered by this Court, which concerns the applicability of the Fourth Amendment to seizures of property in proceedings that are criminal in substance but not in form, and which is inherent in every seizure of goods pursuant to the Federal Food, Drug and Cosmetic Act. The decisions in this case, in *United States v. Eight Packages and Casks of Drugs*, 5 F. (2d) 971, and in *United States v. Eighteen Cases of Tuna Fish*, 5 F. (2d) 979, clearly indicate that there is disagreement concerning the applicability of the Fourth Amendment to cases of this kind and more particularly concerning the scope of the exceptions to the rule of *Boyd v. United States* announced by Mr. Justice Bradley in his opinion.

ARGUMENT.

1. The proceeding instituted by respondent seeks a forfeiture of petitioner's property for violation of a public law. Pursuant to a warrant issued by a deputy clerk of the District Court without support of any affidavit or showing by respondent, this property has been summarily seized and placed beyond petitioner's dominion and control upon the strength of allegations in respondent's complaint that the property constitutes adulterated food within section 402 (a) (3) of the Federal Food, Drug and Cosmetic Act. (21 U. S. C. 342 (a) (3).) The seizure cannot be justified on the ground that the food is adulterated or dangerous to others. That fact remains to be determined and its determination is the sole purpose of the proceeding instituted by respondent and the reason for the provision for hearing specified in section 304. (21 U. S. C. 334.) If it can be justified at all, the seizure can be justified only on the ground that there was probable cause for believing that the food was adulterated in violation of the Act, for surely an agent of respondent may not indiscriminately seize the property of anyone as it may suit his fancy without regard

to the unreasonableness of his assertion or belief that it constitutes adulterated food or drugs.

To say that this is a civil proceeding is not an answer to petitioner's claim that the Fourth Amendment, with its specific requirements, is applicable to the seizure involved here. Certainly there is nothing in the language of the Amendment which supports a general proposition that it is inapplicable to official seizures in connection with civil proceedings, and the decision in *Boyd v. United States*, 116 U. S. 616, is authority that the protection it affords is not so limited. There the United States instituted proceedings to forfeit glass allegedly imported in violation of the revenue laws. A statute authorized the United States attorney to file a motion for an order compelling the production of any book, invoice or paper material to his proof. Allegations in the motion were to be deemed confessed if the document was not produced. Over his objections, the claimant was ordered pursuant to this statute to produce an invoice which was admitted in evidence. Judgment of forfeiture resulted. The claimant was not indicted and there was no charge of criminality although the act provided criminal penalties for violation of its provisions. On writ of error, this Court held that the compulsory production of the invoice constituted an unreasonable search and seizure in violation of the Fourth Amendment.

With specific reference to the nature of the forfeiture proceeding, Mr. Justice Bradley stated:

"We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal. * * * As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, * * *" (pp. 633-634.)

It is undoubtedly true that there are official seizures in civil proceedings to which the protection of the Fourth Amendment does not extend. Instances are suggested in Mr. Justice Bradley's opinion. (116 U. S. 616, 624.) But as the opinion conclusively shows, this falls far short of proving that the Fourth Amendment does not reach a seizure in a proceeding criminal in substance though civil in form involving an alleged violation of a public law which is penal in nature and which exacts drastic forfeitures. Like the act involved in *Boyd v. United States*, the Federal Food, Drug and Cosmetic Act does not provide merely for proceedings to forfeit the offending article. It enumerates twelve classes of prohibited acts (21 U. S. C. 331), among them the act of introducing adulterated food in interstate commerce (21 U. S. C. 331 (a)), and provides penalties of fine or imprisonment, or both, for violations. (21 U. S. C. 333.) This similarity between the statutes is not the only respect in which the *Boyd* case and this case are alike. There the seizure produced evidence which the United States could then offer in a criminal action against the claimant and here the same thing is true. By seizure of the food, if in fact it is adulterated, respondent has procured the best possible evidence of a major element of the crime of introducing adulterated goods in interstate commerce. Indeed, Section 304 (c) expressly permits respondent to obtain a sample of the food which has been seized. (21 U. S. C. 334 (c); cf. *United States v. B. & M. External Remedy*, 36 F. (2d) 53.)

From this comparison of the instant case with the *Boyd* case, it is evident that both involved *in rem* proceedings, civil in form but criminal in substance, to forfeit property for violation of a public law which provided in addition for criminal action against the party responsible for the offending character of the goods. Both involved the procuring of evidence which could be used in a criminal proceeding against the person claiming the goods. It may

be that in the instant case evidence of criminality was not the primary object of the seizure, but this difference is not material; the question is whether there was an unconstitutional search and seizure. An arrest without a warrant is plainly not designed to obtain evidence of crime but it may nevertheless be prohibited by the Fourth Amendment. (Cf. *Carroll v. United States*, 267 U. S. 132.) In consequence the very premises of the decision by the court below that the *Boyd* case is distinguishable should have induced it to reach exactly the opposite conclusion.

2. In addition to its inconsistency with the decision of this Court in *Boyd v. United States*, the decision of the Circuit Court of Appeals is inconsistent with principles announced in *Carroll v. United States*, 267 U. S. 132. There an arrest of two men, search of their auto, and seizure of whiskey, all without a warrant, were held not to constitute an unconstitutional search and seizure which invalidated a conviction because the whiskey was admitted in evidence in a trial of the men for violation of the National Prohibition Act. Search and seizure without a warrant were justified because of the "necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." (p. 153.) It was held, however, that the "measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." (pp. 155-156.) Thus, even a search and seizure without a warrant may be made only when the official has probable cause for believing that the goods to be seized violated the statute.

Here the food, not yet proved to be "contraband," was stored in a Cleveland warehouse building not very many blocks from the office of the United States Marshal. There does not appear to be any reason and respondent has not demonstrated why seizure of this food would have been permissible in the absence of an official writ authorizing it, and the *Carroll* case is authority that even a seizure without such a writ must be grounded upon a showing of probable cause, a showing which respondent has never made. The perfunctory issuance of a warrant of seizure and monition by a deputy clerk of the District Court merely upon filing of respondent's complaint is surely not a substitute. In the absence of an appropriate showing of probable cause for believing, not conclusive evidence obviating the necessity of a trial to establish, that the food was adulterated, the seizure may as well have been made by the Marshal without the warrant or by an agent of the Federal Security Administrator.

If there was probable cause for believing the goods were adulterated, it should have been shown and supported by oath or affirmation. If probable cause was wanting, the seizure should not have been made. In the words of the Virginia resolution urging the adoption of the first ten amendments to the Constitution "all warrants * * * to search suspected places, or seize any free man, his papers or property, without information upon oath * * * of legal and sufficient cause, are grievous and oppressive * * *." House Document No. 398, 69th Cong., 1st Sess., p. 1030; see also New York, North Carolina and Rhode Island resolutions, pp. 1036, 1046, 1054. This is a basic principle of the decision of this Court in *Carroll v. United States* and is equally apparent in the language of the Fourth Amendment. Failure to recognize it is a fundamental error in the decision of the Circuit Court of Appeals.

CONCLUSION.

The petition for writ of certiorari should be granted.

Respectfully submitted,

HAROLD K. BACHELDER,

WILLIAM C. BACHELDER,

EDWIN H. CHANEY,

Attorneys for Petitioner.

SQUIRE, SANDERS & DEMPSEY,

BACHELDER & BACHELDER,

Of Counsel.

APPENDIX.

Constitution of the United States, Amendment 4:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Federal Food, Drug, and Cosmetic Act, Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. 301 et seq.

§ 301. Prohibited acts. The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

* * *

§ 303. Penalties—(a) Violation of Section 301. Any person who violates any of the provisions of Section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.

(b) Same; with intent to defraud or mislead. Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 301, with intent to defraud or mislead, the penalty shall be imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.

* * *

§ 304. Seizure—(a) Grounds and jurisdiction. Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or

while in interstate commerce, or which may not, under the provisions of sections 404 or 505, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *

(b) Procedure; multiplicity of pending proceedings. The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. * * *

(c) Availability of samples of seized goods prior to trial. The court at any time after seizure up to a reasonable time before trial shall by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized, and as regards fresh fruits or fresh vegetables, a true copy of the analysis on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyzed were obtained.

§ 402. Adulterated food. A food shall be deemed to be adulterated * * * (a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 373

LADOGA CANNING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 14-20) is reported at 136 F. (2d) 523. The opinion of the district court (R. 4-6) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 22, 1943 (R. 13). The petition for a writ of certiorari was filed September 22, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Fourth Amendment to the Constitution is applicable to the seizure by court process of an article proceeded against as subject to condemnation under Section 304 of the Federal Food, Drug, and Cosmetic Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sections 304 and 402 of the Federal Food, Drug, and Cosmetic Act (Act of June 25, 1938, c. 675, 52 Stat. 1044-1045, 1046, 21 U. S. C. 334, 342) provide in part as follows:

SEC. 304. (a) Any article of food,
 * * * that is adulterated * * * when
 introduced into or while in interstate com-
 merce, * * * shall be liable to be pro-
 ceeded against while in interstate commerce,
 or at any time thereafter, on libel of in-
 formation and condemned in any district
 court of the United States within the juris-
 diction of which the article is found:
 * * *

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. * * *

SEC. 402. A food shall be deemed to be adulterated—(a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; * * *.

STATEMENT

Proceeding under Section 304 of the Federal Food, Drug, and Cosmetic Act, *supra*, the United States Attorney, on April 9, 1942, filed a libel of information, entitled "Complaint," in the District Court for the Northern District of Ohio on behalf of the United States against, and for condemnation of, approximately 935 cases of Tomato Puree. In conformity with the procedure in admiralty, made applicable by the Act to such cases, the complaint prayed for the issuance of a writ of attachment and monition against the article, basing the prayer on allegations that the article had been shipped in interstate commerce by petitioner and was adulterated within the meaning of Section 402 (a) (3) of the Act in that it contained a decomposed substance as evidenced by mold (R. 2-3). In accordance with the rules of the district court and the usual procedure in ad-

miralty, the complaint was not verified.¹ Pursuant to the prayer of the complaint, the article was seized under a writ of attachment (R. 3-4).

On May 5, 1942, petitioner, appearing specially and alleging that it was the owner of the seized article and had possession thereof when it was seized, filed a motion in the district court to quash the writ of attachment and attachment and for return of the article. As ground for the motion, petitioner contended that the issuance of the writ and seizure of the article were in violation of the Fourth Amendment to the Constitution in that the warrant for the seizure issued and the seizure was made without a showing of probable cause supported by oath or affirmation. (R. 3-4.) The district court sustained the motion, dismissed the complaint, and ordered the return of the article (R. 4-6).

After the filing of a notice of appeal, the district court granted a stay of proceedings to enforce the

¹ Petitioner does not dispute the fact, recognized by this Court in *443 Cans of Egg Product*, 226 U. S. 172, 183 (see also, *United States v. George Spraul & Co.*, 185 Fed. 405 (C. C. A. 6); *Eureka Productions v. Mulligan*, 108 F. (2d) 760 (C. C. A. 2)), that Section 304 of the Act, formerly Section 10 of the Pure Food Act, makes admiralty procedure, without an initial, executive seizure (see note 3, *infra*, p. 10), applicable up through the point of seizure of the article concerned, or the fact, shown in the opinion below (R. 16-18), that it is the general practice in admiralty not to require the verification of a libel filed on behalf of the United States (cf. *Albrecht v. United States*, 273 U. S. 1, 6).

judgment "insofar as the return of the goods is concerned" (R. 7). Petitioner thereupon filed a motion to modify this stay order to make it applicable only "insofar as the dismissal of the libel is concerned" (R. 7-8). The motion was denied (R. 8) and petitioner filed a similar motion in the circuit court of appeals, which was argued along with the merits of the appeal (R. 15). The circuit court of appeals denied the motion, reversed the judgment of the district court, and remanded the case for further proceedings, holding that the Fourth Amendment was inapplicable to a seizure under Section 304 of the Act (R. 13-20).

ARGUMENT

Petitioner contends that, as the district court held (R. 4-6), the seizure of the tomato puree by writ of attachment violated the Fourth Amendment to the Constitution in that the writ issued and the attachment was made pursuant to the prayer of an unverified libel of information and not upon a warrant issued "upon probable cause, supported by oath or affirmation," as required by that Amendment. In support of this contention, petitioner relies entirely upon the decisions of this Court in *Boyd v. United States*, 116 U. S. 616, and *Carroll v. United States*, 267 U. S. 132 (Pet. 4-8), both of which, we submit, refute, rather than support, the contention.

Petitioner's reliance upon the *Boyd* case is predicated upon the erroneous assumption that

the statute involved in that case is analogous to Section 304 of the Federal Food, Drug, and Cosmetic Act (*supra*, pp. 2-3). (See Pet. 6-7.) The proceeding in the *Boyd* case was one for forfeiture of goods under Section 12 of the Act of June 22, 1874, which provided that for the offense of bringing in goods into the United States in violation of the customs laws the *offender* might be punished by a fine of from \$50 to \$5,000, or imprisonment for not exceeding two years, or both, and that, in addition to such fine, "such merchandise shall be forfeited." The question in that case was whether the defendant's rights under the Fourth and Fifth Amendments to the Constitution had been violated by the introduction in evidence, over the objection of the defendant, of an invoice produced by the defendant upon demand of the United States Attorney pursuant to Section 5 of the same Act. That section provided that in a proceeding other than criminal arising under the revenue laws the attorney representing the United States might request the production by the defendant of pertinent papers and if the papers were not produced the attorney's statement of their context would be taken as true. Predicating its decision upon the premise that a forfeiture proceeding under Section 12 of that Act was criminal in nature,²

² The Court said (p. 634) :

"In this very case, the ground of forfeiture as declared in the 12th section of the act of 1874, on which the information is based, consists of certain acts of fraud committed against

this Court held that the compulsory production of papers in such a proceeding was in effect an unlawful search and seizure and required the defendant to produce evidence which might tend to incriminate him.

The situation in the instant case, both as to the article seized and the type of proceeding in which it was to be used, is altogether different. The Federal Food, Drug, and Cosmetic Act has distinct criminal and condemnation provisions, Section 303 of the Act (21 U. S. C. 333) providing for criminal penalties and Section 304 (*supra*, pp. 2-3) for seizure and condemnation of the offending article. The latter section is, by its express terms, made a proceeding *in rem* against the article itself, and the condemnation which results from such a proceeding is no part of the crimi-

the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared, that the offender shall be fined not exceeding \$5,000, nor less than \$50, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one."

nal penalty imposable upon the person introducing the article in interstate commerce. A proceeding under the section is therefore civil, not criminal, in character (see *443 Cans of Egg Product*, 226 U. S. 172; *Lilienthal's Tobacco v. United States*, 97 U. S. 237; *Dobbins's Distillery v. United States*, 96 U. S. 395, 399; *Eureka Productions v. Mulligan*, 108 F. (2d) 760 (C. C. A. 2); *United States v. Three Tons of Coal*, 28 Fed. Cas. No. 16515), and the seizure authorized is one which is for the purpose of obtaining jurisdiction over the *res*, not to secure evidence against the owner of the article. It follows that the holding of the *Boyd* case, that the compulsory production of papers which might tend to incriminate the defendant in a proceeding which is criminal in nature, does not support the conclusion that the Fourth Amendment to the Constitution applies to a seizure under Section 304 of the Federal Food, Drug, and Cosmetic Act.

Nor does the decision of the Court in *Carroll v. United States*, 267 U. S. 132, aid petitioner's contention. That case involved a *search* of an automobile for contraband liquor, and the question there was whether the liquor found through the search might constitutionally be introduced in evidence in a *criminal* prosecution.

In contrast to the main holdings of both the *Boyd* and *Carroll* cases, both decisions in effect recognize the validity of the seizure in the instant case. For the purpose "of showing the principle on which the Fourth Amendment proceeds, and to

avoid any misapprehension of what was decided" (*Carroll v. United States, supra*, p. 149), the Court in the *Boyd* case stated that pp. (623-624) "The search for and seizure of stolen or forfeited goods * * * are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto caelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. * * * the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. * * * it is clear that the members of that body [the same Congress which proposed for adoption the original amendments to the Constitution] did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. * * * So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, * * * are not within this category. * * * Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law, for

the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, * * * is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution; * * *.” This language, which was quoted with approval in the *Carroll* case, *supra*, pp. 149-150, plainly covers the seizure in the instant case and, as petitioner admits, recites instances of “official seizures in civil proceedings to which the protection of the Fourth Amendment does not extend” (Pet. 6). See *United States v. Eighteen Cases of Tuna Fish*, 5 F. (2d) 979 (W. D. Va.); *United States v. Eight Boxes, Etc.*, 105 F. (2d) 896 (C. C. A. 2); *Murray’s Lessee et al. v. Hoboken Land & Imp. Co.*, 18 How. 272.

The above noted exception relative to the applicability of the Fourth Amendment to seizures of forfeited goods states a conclusion based on numerous cases, recent and otherwise, which reveal that the exception applies even though the goods are not forfeited at the time of the seizure. Unlike Section 304 of the Federal Food, Drug, and Cosmetic Act and like seizure cases in admiralty, statutes such as the prohibition, customs, and tariff acts have authorized forfeiture proceedings *preceded by* an initial executive seizure of the property.³ In such cases, as this Court has

³ It was early held that an initial, executive seizure was a condition precedent to the jurisdiction of the federal courts in seizure cases in admiralty, because the Judiciary Act of

stated, "anyone may seize any property for forfeiture to the Government, and * * * if the Government adopts the act and proceeds to enforce the forfeiture by legal process, this is of no less validity than when the seizure is by authority originally given. * * * The owner of the property suffers nothing that he would not have suffered if the seizure had been authorized. * * * We can see no reason for doubting the soundness of these principles when the forfeiture is dependent upon subsequent events any more

September 24, 1789, gave those courts jurisdiction in cases of "seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas" (*The Ann*, 9 Cr. 289, 290), and forfeiture statutes have generally followed this procedure. See, e. g., *The Motor Vessel "K-22845,"* 55 F. (2d) 666, 669 (E. D. N. Y.), affirmed, 55 F. (2d) 671; *United States v. A Quantity of Contraband Liquor, Etc.*, 47 F. (2d) 321, 325 (W. D. Pa.); *United States v. George Spraul & Co.*, 185 Fed. 405 (C. C. A. 6). In contrast, Section 304 of the Federal Food, Drug, and Cosmetic Act provides that "The article shall be liable to seizure *pursuant to the libel*" [*italics supplied*] and therefore requires no initial, executive seizure to give the court jurisdiction to condemn the article. See *United States v. Capon Water Co.*, 30 F. (2d) 300 (E. D. Pa.); *United States v. George Spraul & Co.*, *supra*. The failure to recognize this fact in *United States v. Eight Packages and Casks of Drugs*, 5 F. (2d) 971 (S. D. Ohio), was the basis of the only decision we are aware of, outside of the opinion of the district court in the instant case, which holds that the Fourth Amendment is applicable to a seizure under Section 304 of the Federal Food, Drug, and Cosmetic Act. The decision is, of course, overruled by the opinion of the circuit court of appeals in the instant case.

than when it occurs at the time of the seizure, * * *. The exclusion of evidence obtained by an unlawful search and seizure stand on a different ground" (*Dodge v. United States*, 272 U. S. 530, 532; see also, *United States v. One Ford Coupe*, 272 U. S. 321, 325; *Wood v. United States*, 16 Pet. 342, 359; *Gelston v. Hoyt*, 3 Wheat. 246, 310). The court has also held that it is immaterial in such cases that the seizure was irregular, illegal, or not well founded. *Woods v. United States*, *supra*, p. 358; *Taylor v. United States*, 3 How. 197, 205; *The Merino*, 9 Wheat. 391, 403; *The Richmond*, 9 Cr. 102. In consonance with these decisions, some of the lower federal courts have specifically held that an initial, unlawful search and seizure does not divest the district courts of jurisdiction in a condemnation of forfeiture proceeding.⁴ Fundamentally, all of these decisions recognize the inapplicability of the Fourth Amendment to the seizure of an article proceeded against in an *in rem* proceeding, the underlying principle being, it appears, that

⁴ See *United States v. Pacific Finance Corporation*, 110 F. (2d) 732, 733 (C. C. A. 2); *United States v. Eight Boxes, Etc.*, *supra*; *Strong v. United States*, 46 F. (2d) 257 (C. C. A. 1), appeal dismissed per stipulation, 284 U. S. 691; *Bourke v. United States*, 44 F. (2d) 371 (C. C. A. 6), certiorari denied, 282 U. S. 897; *United States v. One Lot of Intoxicating Liquor*, 27 F. (2d) 903, 904 (S. D. Tex.). *Contra*: *United States v. A Quantity of Contraband Liquor, Etc.*, 47 F. (2d) 321 (W. D. Pa.); *Ghisolfo v. United States*, 14 F. (2d) 389 (C. C. A. 9); *Pappas v. Lufkin*, 17 F. (2d) 988 (D. Mass.).

the amendment does not secure property the right to which may be taken away "by some public law * * * for the sake of justice and the general good" (see *Boyd v. United States*, *supra*, p. 627).⁵

CONCLUSION

The decision of the circuit court of appeals was clearly correct and does not conflict with the decision of any court outside that circuit. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

OSCAR A. PROVOST,
Special Assistant to the Attorney General.

MELVA M. GRANEY,
Attorney.

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⁵There is nothing in Section 304 (c) (21 U. S. C. 334) which, in terms, authorizes the use of samples of the tomato puree in a criminal proceeding against petitioner (see Pet. 6). That section relates to the obtaining of samples for use in a condemnation proceeding. The question whether such a sample may, subsequent to condemnation, be used in a criminal proceeding against petitioner, if such a proceeding would lie (cf. Sec. 304 (a) (21 U. S. C. 331)), is, of course, not involved in this case.